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900 10th Street, NW
Suite 600

Washington, D.C. 20005-3960

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① +1.202.654.6200
② +1.202.654.6211
PerkinsCoie.com

May 6, 2016

OFFICE OF GENERAL
COUNSEL

Marc Erik Elias
Danielle Friedman

MElias@perkinscoie.com

DanielleFriedman@perkinscoie.com

D. +1.202.434.1609

F. +1.202.654.9126

BY MESSENGER

Jeff S. Jordan
Supervising Attorney
Complaint Examination & Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6792

Dear Mr. Jordan:

We write as counsel to Sean Eldridge; Sean Eldridge for Congress (the "Committee"); Michael Oates in his official capacity as Treasurer; and Hudson Valley Economic Development Corporation ("HVEDC") (collectively, the "Respondents") to provide additional factual and legal responses to the Commission's finding of a reason to believe that the Committee knowingly accepted a prohibited corporate contribution in violation of 52 U.S.C. § 30118(a). The alleged contribution of seventeen seconds of amateur video footage resulted in, at most, a *de minimis* benefit to the Committee. Accordingly, the Commission should exercise its prosecutorial discretion under *Heckler v. Cheney* and promptly dismiss this matter.

I. No Contribution Was Made Because the Footage Had No Commercial Value

The Complaint alleges that HVEDC provided video footage to the Committee that the Committee then used in a web video. The Complaint and the Office of General Counsel ("OGC") in its Factual and Legal Analysis incorrectly conclude that providing such footage resulted in HVEDC making, and the Committee knowingly accepting, a prohibited in-kind contribution. In fact, the video footage had no value, and, accordingly, was not a contribution.

The video had no value because HVEDC (a) did not make any payment or expenditure for the production of the video footage in question; (b) broadcast the video footage at a free public event covered by the media, and (c) offered the video free of charge to a number of entities. The video consists of footage shot and edited on a volunteer basis for HVEDC. Neither HVEDC nor any other individual or entity made any payment or expenditure for the original production of the video. It is not unusual for HVEDC to receive free video footage; the individual volunteer videographer who filmed the footage in question produced multiple videos for HVEDC throughout 2014 and all of these videos were provided to HVEDC free of cost.

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In addition, HVEDC is not in the business of producing, marketing or selling video footage and, as a result, did not consider the footage to have any value. In fact, the video footage was widely available free of charge: first, HVEDC showed the video at a free public event that was covered by the media; second, HVEDC offered the video free of charge to a number of entities mentioned in the video, including Central Hudson, SUNY New Paltz and Hudson River Ventures; and third, if asked, HVEDC would provide the footage to any individual or organization – whether or not a political committee – at no charge.¹

The Federal Election Campaign Act (the “Act”) defines a “contribution” as “any gift, loan, advance, or deposit of money or anything of *value* made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A) (emphasis added). The Commission defines the phrase “anything of value” to mean the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services. 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

“Usual and normal charge for goods” is the process of goods in the market from which they would have ordinarily been purchased at the time of the contribution. *Id.* § 100.52(d)(2). However, where the normal and usual charge for goods or services is zero, the Commission has long concluded that providing those goods or services free of charge to a political committee does not result in a contribution to the political committee. Advisory Opinion 2004-06 (Meetup); Advisory Opinion 1978-60 (Sawyer). For example, in Advisory Opinion 1978-60, a candidate received free video footage from NBC. The Commission concluded that if NBC had the policy or practice “to provide, upon request, a copy of the videotape free of charge to any member of the public ... then the free film would not be given in connection with a Federal election nor given to influence your election. *Accordingly, it would not be a contribution under the Act.*” Advisory Opinion 1978-60 (emphasis added).

The facts in this matter are nearly the same as those in Advisory Opinion 1978-60. HVEDC has already made the video in question publicly available free of charge by broadcasting it at a free public event covered by the media and offering it to several other organizations free of charge. HVEDC would, in addition, provide the video free of charge to any person or individual who requested the footage. As a result, like NBC’s videotape in Advisory Opinion 1978-60, the footage is not a contribution under the Act. Because no “contribution” was made or accepted under the Act as interpreted by FEC precedent, the Commission should dismiss the complaint and close the file in this matter.

¹ See Affidavit of Laurence P. Gottlieb (attached).

II. If a Contribution Was Made, the Contribution was *de minimis*

Even if the seventeen seconds video footage in question was “anything of value,” which it is not, its value would be *de minimis*. The OGC’s factual and legal analysis massively overstates the amount of the possible benefit that the footage represents to the Committee in two ways: First, OGC suggests that raw video footage that is not used in the Committee’s final web video is somehow “itself a benefit in the production process.” Second, OGC wrongly points to a \$67,450 payment to SKDKnickerbocker, LLC (“SKDK”) for media production services as a basis for establishing the cost of the “Why I’m Running” video. When correctly valued, the most that the Committee could have possibly benefited from seventeen seconds of video footage is a mere fraction of this amount. In similar past instances of a *de minimis* corporate contribution, the Commission has rightly exercised its prosecutorial discretion and declined to pursue further enforcement.

A. The Committee Received No Benefit From Unused Video Footage

OGC suggests in its Factual and Legal Analysis that raw video footage not used in the Committee’s final web video was somehow “itself a benefit in the production process.” This assertion misstates the relevant facts and misapplies FEC precedent.

First, it is important to clarify that the Committee itself did not receive any footage from any source in this matter. Rather, the Committee hired the vendor SKDK to produce the “Why I’m Running” video and subsequent campaign ads. To the extent SKDK may have received video footage from HVEDC, and to the extent that the footage SKDK received but did not use in the final video could be considered a “benefit in the production process,” the Committee paid the usual and normal charge for that production process. Specifically, the Committee reported a \$67,450 expenditure to SKDK for media production services on its 2013 Year End Report filed with the Commission. Of this \$67,450 payment, \$17,450 was for SKDK’s editing and video production services related to the “Why I’m Running” web video. Thus, the Committee paid for “the production process,” including the “benefit,” if any, of any footage that the Committee never even used.

Moreover, in past enforcement matters related to alleged in-kind contributions by corporations, the Commission has examined *the benefit actually realized by the committee* to assess the value of the contribution. For example, in MUR 6331 (Gibson for Congress), a committee received an in-kind contribution from a corporation in connection with a fundraising event. In evaluating the matter, the Commission did not place a value on the corporate resource in question, but instead looked to “the relatively low level of proceeds needed at the event” and exercised prosecutorial discretion to dismiss the matter because of the *de minimis* benefit realized by the committee. MUR 6331; General Counsel’s Report at 4. Similarly, in MURs 6287, 6288 and 6297 (Libatore for Congress) the FEC dismissed a matter where the candidate used corporate resources but the

resources resulted in a *de minimis* benefit to the committee. See also MUR 6542 (Mullin for Congress), Factual and Legal Analysis at 7 (assessing the benefit actually realized by the committee when use of corporate resources is at issue).

In other words, when evaluating the amount of an alleged in-kind contribution, the FEC regularly looks to the benefit actually realized by the committee – not the overall value of a corporate resource – to calculate the value of a contribution. In this case, the Committee only derived a benefit from the seventeen seconds of HVEDC video footage that actually appears in the “Why I’m Running” video. While it certainly may be possible to assign some greater value to the full amount of the HVEDC footage, longstanding FEC precedent is clear that the relevant metric for purposes of compliance with the Act and Commission regulations is the benefit actually received by the committee – i.e., seventeen seconds of video footage.

B. OGC Incorrectly Identifies the Cost of the Committee’s Video

Separately, OGC in its Factual and Legal Analysis states that the Committee “may have spent \$67,450 to produce the campaign ad” in question. This is incorrect, and the actual payments in connection with the web video were much less. The \$67,450 payment to the SKDK for Media Production Services was comprised of the following: \$17,450 for editing services related to the “Why I’m Running” web video in question; and \$45,000 for a two-day video shoot for footage of Mr. Eldridge and others that was used not only in the “Why I’m Running” video, but also in five other subsequent campaign advertisements. Accordingly, only one-sixth of the \$45,000 – or \$7,500 – is properly allocable to the “Why I’m Running” video, and the total cost of the video was therefore \$24,950 (\$7,500 for the SKDK footage and \$17,450 for editing services).

However, while the \$67,450 total payment to SKDK does not accurately reflect the value of the “Why I’m Running” web video, the \$45,000 portion of that payment related to the two-day video shoot provides an approximation for the value of video footage in general. As stated above, the portion of the SKDK footage allocable to the “Why I’m Running” video is properly valued at \$7,500. The entire video is two minutes, forty-eight seconds long. Thus, the approximate value of the video footage is \$44.60 per second. This figure assumes a professional-quality video shoot using union production personnel. A video such as HVEDC’s – which was shot free-of-charge by volunteers – is likely worth significantly less.

OGC calculated that there are seventeen seconds of overlap between the video footage that appears in the Committee’s video and a video posted online by HVEDC.² Assigning a value to this footage by using the benchmark value of SKDK’s professional-quality video shoot using union personnel results in a value of \$758.20 for the HVEDC footage in the Committee’s “Why

² Factual and Legal Analysis at 4.

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I'm Running" video. Thus, even if the HVEDC footage were not freely available to anyone who requested it, which it is, the value of the video in question is closer to \$750, not \$67,000.

C. The Commission has Exercised Prosecutorial Discretion Under Similar Facts

The Commission has consistently exercised its prosecutorial discretion to dismiss complaints that allege corporate contributions of similar *de minimis* amounts. In the enforcement matter with the facts closest to this situation (which OGC actually cites in footnote 26 of its Factual and Legal Analysis in this matter), a committee received video footage consisting of two full campaign ads. See MUR 5964 (Schock for Congress), Statement of Reasons of Chairman Walther, Vice Chairman Petersen and Commissioners Bauerly, Hunter and Weintraub. The committee submitted evidence showing that the value of the footage was \$750 – approximately the same as the value of the footage in this matter. *Id.* Like it has done in this matter, OGC recommended an additional commitment of Commission resources to unearth the actual cost of the footage. The Commission, however, pointed to “the relatively small amount potentially in violation” and voted to dismiss the matter in an exercise of prosecutorial discretion. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). See also MUR 6754 (AMVETS), Factual and Legal Analysis at 4 (finding an alleged \$750 to be *de minimis* and dismissing the matter).

The alleged contribution in this case – consistent of a mere seventeen seconds of amateur video worth no more than \$758 – likewise warrant the exercise of the Commission’s prosecutorial discretion to decline pursuing a *de minimis* violation.

III. CONCLUSION

For the foregoing reasons, the Commission should close the file and take no further action in this matter.

Very truly yours,



Marc E. Elias
Danielle Friedman
Counsel to Respondents

BEFORE THE FEDERAL ELECTION COMMISSION

In re

Sean Eldridge for Congress, et al.

MUR 6792

AFFIDAVIT OF LAURENCE P. GOTTLIEB

I, Laurence P. Gottlieb, do depose and state as follows:

1. My name is Laurence P. Gottlieb. I am the President and Chief Executive Officer of the Hudson Valley Economic Development Corporation, located at 4 Crotty Lane, Suite 100, New Windsor, NY 12553.
2. In May of 2013, Hudson Valley Economic Development Corporation announced a public/private partnership to invest in 3D printing in the Hudson Valley.
3. As part of announcing the partnership, an individual volunteered to shoot video footage prior to the event and produced a product announcement video to be shown at the event. The video footage shot by the volunteer is the same video footage at issue in this matter.
4. Hudson Valley Economic Development Corporation did not make any payment to the volunteer for the video footage. Additionally, the individual volunteer in question regularly produces videos, free of charge, for Hudson Valley Economic Development Corporation.
5. Hudson Valley Economic Development Corporation did not view the announcement video as a corporate asset, as it is not in the business of creating, producing, licensing or selling video footage.
6. Hudson Valley Economic Development Corporation made the video in question freely available to the public in a variety of ways: first, it broadcast the video at a free public

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